IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

COMPANY APPLICATION NO.39 OF 2007
IN
COMPANY PETITION NO.875 OF 1999

M/s. Nilkamal Plastics Ltd. ..Petitioner.
Vs.
The Rupee Co-operative Bank Ltd. ..Applicant.
and
Official Liquidator
(being Provisional Liquidator of
M/s. Poona Beverages Pvt. Ltd.) ..Respondent.

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Mr. K.V. Tembe with Ms. Madhuri Gaikwad for the Applicant.
Mr. Kiran Kulkarni for the Petitioner.
Mr. A. A. Kumbhakoni with Mr. M.J. Jamdar for the Respondent.

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CORAM: **DR. D.Y. CHANDRACHUD, J.**

21st June, 2007.

P.C. :

1. The Rupee Co-operative Bank Limited which claims to be the secured creditor of Poona Beverages Pvt. Ltd., the Company in liquidation, has moved the Company Application which forms the subject matter of the proceedings. The relief sought is a direction to the Official Liquidator to pay a sum of Rs.4,45,18,367.60, being the claim of the Bank as on 31st December, 2006 out of the sale proceeds of the movable and

immovable property of the company lying with the Liquidator together with further interest.

2. In the course of its business the Applicant had sanctioned loans and advances to the company and outstanding dues on the date of liquidation, 30th June, 2004, were stated to have been in the amount of Rs.3,69,17,030/-. The land and building of the company situated at Plot E- 25, 26 and 27, MIDC, Bhosari Industrial Estate, Pune was mortgaged to the Applicant by a deed of mortgage dated 4th December, 1999. The charge was duly registered. Besides the immovable property there was a hypothecation of movables including plant and machinery in favour of the Applicant. Eight charges came to be registered by the lodgment of the requisite forms with the Registrar of Companies pursuant inter alia to the provisions of Section 125 of the Companies Act, 1956. A compilation thereof has been placed on the record. As a secured creditor the Applicant took recourse to its remedies under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. A notice under Section 13(2) was issued on 22nd October, 2003. The Applicant took possession of the secured assets including the land,

building, plant, machinery and hypothecated goods on 24th January, 2007. The Applicant duly advertised the sale of the mortgaged property in several national newspapers. According to the Applicant it was on 10th October, 2004 that it received a notice from the Official Liquidator that an order of winding up had been passed on 2nd July, 2004 by this Court, the order of the Court also appointing the Official Liquidator as Provisional Liquidator. The Applicant thereupon took out a Company Application (C. A. 471 of 2005) for seeking the permission of the Company Judge for the sale of the secured assets. A Learned Single Judge of this Court by an order dated 17th February, 2006 granted permission to do so. The order of the Court recorded that prima facie there did not appear to be a dispute about the Applicant being the mortgagee in respect of the property of the company, but at the same time the dues of the workers and other statutory dues would also have to be paid out of the sale proceeds. Consequently, the Court observed that it was not open to the Applicant Bank at that stage to appropriate the entire sale proceeds. The Court issued directions for the issuance of an advertisement for conducting a public auction and directed the Liquidator to take necessary steps thereafter, including by moving the Court for the confirmation of the

sale. An auction sale took place upon which an order was passed by a Learned Single Judge of this Court on 30th November, 2006 confirming the sale in favour of the highest bidder at and for a consideration of Rs.6.25 Crores. The sale was both of the movable and immovable assets. In pursuance of the order of the Court the purchaser deposited the balance of the entire consideration and possession was handed over on 8th January, 2007. An amount of Rs.6.25 Crores is lying with the Official Liquidator.

3. At the hearing of the Company Application, it has been urged on behalf of the Applicant that steps were taken by the Applicant in accordance with the provisions of the Securitization Act and immediately upon being informed of the order of winding up, this Court was moved for permission for the sale of the property under the provisions of Section 537-1(b) of the Companies Act, 1956. The sale has been confirmed after due procedure was followed and the highest bid in the amount of Rs.6.25 Crores was accepted. The Applicant now seeks disbursal of the amount of its claim and is ready and willing to furnish an undertaking that in the event that any part thereof is required to be brought back to meet

the dues of the workers upon being adjudicated by the Official Liquidator, the Applicant shall do so forthwith.

4. There are five provisos to the provisions of Section 13(9) of the Securitization Act which would merit consideration in these proceedings and they are as follows :

> "13(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors :
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> Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956);
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> Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act;
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> Provided also that the liquidator referred to in

> the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator;
>
> Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator;
>
> Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any."

5. On behalf of the Original Petitioner to the Company Petition for winding up the status of the Applicant as a secured creditor has been sought to be questioned. At this stage it would merit emphasis that the ex-directors of the company in liquidation have also appeared before the Court through counsel and have sought to question the correctness of the claim advanced before this Court on behalf of the Applicant Bank. Insofar as the company and its ex-directors are concerned, it would merit emphasis that after receipt of a notice under sub section (2) of Section 13 of the

Securitization Act, neither was any objection preferred under Sub Section 3A nor was the Debts Recovery Tribunal moved under sub section (7) of Section 17. A remedy is provided for the borrower on the receipt of a notice under sub section (2) to raise an objection before the secured creditor under sub section 3A of Section 13. The borrower did not avail of that remedy nor for that matter did the borrower lodge an appeal before the Debts Recovery Tribunal as provided in sub section (7) of Section 17. Having failed to avail of the statutory remedy under the Securitization Act, the borrower and its ex-directors cannot now be heard to question the correctness of the claim lodged by the Bank before the Company Court. Parliament has enacted the Securitization Act and has provided for a self contained code, detailing therein remedies that are available to the borrower. In fact, Section 35 of the Act provides that the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument.

6. Insofar as the Petitioner in the Company Petition for winding up is concerned, it has been submitted before the Court that the charge that was registered with the Registrar of

Companies under Section 125 covered only an amount of Rs.40 lacs and that therefore, the Applicant is not a secured creditor in respect of the balance of the claim. There is no merit in the submission. Form A which was lodged with the Registrar of Companies on 5th May, 2001 clearly spells out that it was by the deed of mortgage dated 4th December, 1999 that the charge was created. The deed of mortgage provides that a charge was being created in consideration of a sum of Rs.40 lacs advanced to the borrower by the mortgagee Bank, the Applicant herein. Clause 19 of the deed of mortgage specifically provides thus:

> "19) It is agreed by and between the parties that the said property/properties is to stand as a continuing security for the loan sanctioned by the Mortgagee Bank to the Mortgagor- Company and it will be enforceable for all monies which may at any time become due and owing by the Mortgagor- Company to the Mortgagee Bank under the said account and/or all other accounts, was after expiry of the period."

Therefore it is abundantly clear that the properties were to stand as continuing security for the loan which was sanctioned by the Bank and would continue to be enforceable for all monies which would thereafter become due under the said Act and all other accounts after the expiry of the period. The notice dated 22nd October, 2003

issued by the Bank contains a detailed enumeration of all the facilities that were granted and the amounts due thereunder.

7. That leaves the Court with an analysis of the provisions contained in the provisos to sub section (9) of Section 13. The effect thereof is that in the case of a company in liquidation, the amount realized from the sale of the secured assets is to be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956. However, where a company is being wound up on or after the commencement of the Act a secured creditor may opt to realize his security instead of relinquishing it and proving his debt in liquidation. In such a case the second proviso provides that the secured creditor may retain the sale proceeds of his secured assets after depositing the dues of the workers with the Liquidator in accordance with Section 529-A. Under the third proviso, the Liquidator has to intimate the secured creditor the dues of the workmen and in the event that those cannot be ascertained an estimate has to be furnished to the secured creditor. Once the dues are adjudicated any shortfall has to be made good by the secured creditor and on the other hand an excess deposited has to be returned. The explanation provides

that the amount outstanding is to include the principal, interest and any other dues payable by the borrower to the secured creditor in respect of the secured assets as per the books of account of the secured creditor.

8. In the present case, the sale was held in pursuance of the order of this Court jointly by the Liquidator and by the Applicant as secured creditor and the sale proceeds are lying in deposit with the Liquidator. In pursuance of the directions of this Court the Applicant has filed an affidavit clarifying that on the date of the order of winding up, 30th June, 2004, the amount due and payable to the Applicant was Rs.3,69,17,030/-. The Applicant has claimed various other expenses out of which certain expenses can well be allowed in view of this Court. These are (i) expenses for insuring the security amounting to Rs.21,099/-; (ii) expenses for providing security to safeguard the secured assets amounting to Rs.5,64,752/-; (iii) monies paid to the Liquidator for issuing public notices and conducting the sale amounting to Rs.2,75,000/-.

9. In these circumstances, there shall be a direction in the Company Application in the following terms :

i) The Official Liquidator is directed to disburse an amount of Rs.3,69,17,030/- to the Applicant at the present stage together with further amounts of Rs.21,099/- (insurance charges); Rs.5,64,752/- (security expenses) and Rs.2,75,000/- (sale expenses) within a period of two weeks from today;

ii) The disbursal of the amounts in pursuance of the direction in clause (i) above shall be subject to the Applicant filing an undertaking before the Liquidator in terms of the 5th proviso to sub section (9) of Section 13 of the Securitization Act that if any further amount is due and payable by the Applicant on account of workmen's dues under Section 529-A of the Companies Act, 1956, the Applicant shall bring back the aforesaid amount if so directed by this Court, together with such rate of interest as may be awarded;

iii) The Applicant has agreed before the Court to furnish to the Official Liquidator a statement in support of the computation of its claim both in respect of the principal, interest and other dues as per the books of accounts of the secured creditor. In the event that

upon a scrutiny thereof the Official Liquidator finds that any directions are necessary by this Court, the Official Liquidator will be at liberty to move a further report.

10. Before concluding it may be recorded that it has been submitted on behalf of the ex-directors of the company in liquidation that a proposal for a one time settlement was submitted to the Applicant Bank. Mr. Kumbhakoni, learned counsel appearing on behalf of the ex-directors has stated that his instructions are that no intimation has been received in respect of the proposal. Counsel appearing for the Applicant states that the proposal was rejected on 6th February, 2007 but at the present stage, he is not able to ascertain as to whether the order of rejection was duly served on the ex-directors. Nonetheless it has been stated on behalf of the Applicant Bank in all fairness that should any fresh proposal be submitted in accordance with the applicable norms and guidelines, the Bank shall duly consider the same in accordance with law.

The Company Application is accordingly disposed of.